

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

*Orig & Affidavit
of mailing*

77-2005

To be submitted

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 77-2005

ROBERT ADAMS,

Appellant,

—against—

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

DAVID G. TRAGER,
*United States Attorney,
Eastern District of New York.*

BERNARD J. FRIED,
ALLYNE R. ROSS,
*Assistant United States Attorneys,
Of Counsel.*

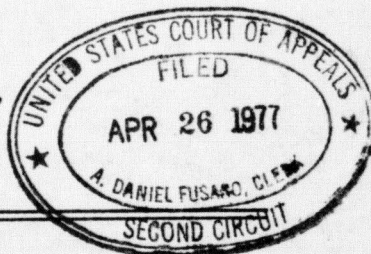


TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Statement of Facts and Prior Proceedings	1
ARGUMENT:	
The provisions of the Interstate Agreement on Detainers do not apply to writs of <i>habeas corpus ad testificandum</i> issued by a jurisdiction in which no criminal charges are pending against the prisoner at the time of the issuance and satisfaction of the writ	3
CONCLUSION	9

TABLE OF AUTHORITIES

Cases:

<i>United States v. Cyphers and Ferro</i> , Dkt. Nos. 76-1131 and 76-1160, Slip Op. 1737 (2d Cir., February 8, 1977), petition for rehearing or rehearing <i>en banc</i> pending	4, 8
<i>United States v. Ford</i> , Dkt. No. 76-1319, Slip Op. 1681 (2d Cir., February 3, 1977), petition for rehearing or rehearing <i>en banc</i> pending	3-4
<i>United States v. Mauro and Fusco</i> , 544 F.2d 588 (2d Cir. 1976), petition for rehearing or rehearing <i>en banc</i> denied March 15, 1977	4, 7, 8

Other Authorities:

116 Cong ⁹ Rec. (1970)	4
3 U.S. Code Cong. & Adm. News (1970)	4

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 77-2005

ROBERT ADAMS,

Appellant,

—against—

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR THE APPELLEE

Preliminary Statement

Appellant Robert Adams appeals from an order of the United States District Court for the Eastern District of New York (Platt, J.), entered on December 17, 1976, denying his application, pursuant to Title 28, United States Code, § 2255, to vacate his plea of guilty and sentence and dismiss with prejudice the underlying information charging him with conspiracy to commit bank robbery (Title 18, U.S.C., § 371) on the ground that they were in violation of the Interstate Agreement on Detainers, Title 18, U.S.C., App.

Statement of Facts and Prior Proceedings

On or about July 25, 1974, appellant, then an inmate in the custody of the State of New York serving a state imposed sentence at Greenhaven prison, Stormville, New

York, was produced at the United States Courthouse for the Eastern District of New York pursuant to a writ of *habeas corpus ad testificandum* issued pursuant to Title 28, U.S.C., § 2241(c)(5). The writ directed that appellant be produced before a Grand Jury to testify in the case of *United States v. John Doe*. Four days thereafter, on July 29, 1974, appellant was returned to state custody. As of that time, no federal charges whatsoever—by complaint, information or indictment—had been lodged against him or, indeed, were in existence.

Approximately a year and a half later, on December 12, 1975, when appellant was no longer in custody, a complaint was filed in the United States District Court for the Eastern District of New York, charging him with bank robbery in violation of Title 18, U.S.C. § 2113(a). On May 28, 1976, appellant waived indictment and entered a plea of guilty to an information charging him with conspiracy to commit bank robbery in violation of Title 18, U.S.C., § 371. On August 27, 1976, he was sentenced to a term of four years imprisonment. He is currently serving this sentence in Danbury Federal Correctional Institution, Danbury, Connecticut.*

* In his recitation of the facts on this appeal, appellant has introduced a considerable amount of material which was not part of the record before the district court. For example, he has here alleged for the first time that he made verbal and written admissions regarding the bank robbery in July of 1974, prior to his return to state custody; that information regarding those admissions was noted on his state prison records; and that the threat of possible criminal charges caused him severe anxieties and disabled him from participating in various prison programs. While certain of appellant's newly raised factual assertions are not in dispute, others, which are disputed, would require our going to outside of the record in order to formulate a response. We do not, however, find need to supplement the record in any of these respects since, as we argue below, even assuming *arguendo* the accuracy of his factual contentions, appellant is not entitled to the relief sought.

ARGUMENT

The provisions of The Interstate Agreement on Detainers do not apply to writs of *habeas corpus ad testificandum* issued by a jurisdiction in which no criminal charges are pending against the prisoner at the time of the issuance and satisfaction of the writ.

In substance, appellant alleges that his return to state custody in July of 1974, without a federal trial, violated Article IV(e) of the Interstate Agreement on Detainers Act (hereafter, the "Act"), Title 18, United States Code, Appendix.

While appellant was indeed returned to state custody before any federal trial, he was also returned to state custody some eighteen months prior to the lodging of *any* federal criminal charge against him. Moreover, the writ which commanded his presence in the Eastern District of New York in July of 1974, at a time when no criminal charges were pending against him in that court, was a writ of *habeas corpus ad testificandum*, not a writ of *habeas corpus ad prosequendum*. Based on these undisputed facts, the district court correctly concluded that the provisions of the Interstate Agreement on Detainers have no application to the case at bar.

The Interstate Agreement on Detainers was enacted by Congress in 1970. The purposes of the Act were two-fold: First, it was designed to provide for the prompt and orderly disposition of criminal charges *pending* against a prisoner held by another jurisdiction. Additionally, it was intended to prescribe a simplified and uniform set of rules governing the transfer of prisoners between jurisdictions *for purposes of trial*. *United States*

v. *Ford*, — F.2d —, Dkt. No. 76-1319, Slip Opin. 1681, at 1687, 1694-95 (2d Cir., decided February 3, 1977), petition for rehearing or rehearing *en banc* pending. See, also, *United States v. Cyphers and Ferro*, — F.2d —, Dkt. Nos. 76-1131, 76-1160, Slip Opin. 1737 at 1745 (2d Cir., decided February 8, 1977), petition for rehearing or rehearing *en banc* pending; *United States v. Mauro and Fusco*, 544 F.2d 588 (2d Cir. 1976), petition for rehearing or rehearing *en banc* denied March 15, 1977; 3 U.S. Code Cong. Admin. News 4864 (1970); 116 Cong. Rec. 38840 (1970).

More specifically, and in the language of the Act, Article I states with regard to its purposes that:

"The party States find that charges outstanding against a prisoner, detainees based on untried indictments, informations, or complaints and difficulties in securing speedy trial of persons already incarcerated in other jurisdictions, produce uncertainties which obstruct programs of prisoner treatment and rehabilitation. Accordingly, it is the policy of the party States and the purpose of this agreement to encourage the expeditious and orderly disposition of such charges and determination of the proper status of any and all detainees based on untried indictments, informations, or complaints. The party States also find that proceedings with reference to such charges and detainees, when emanating from another jurisdiction, cannot properly be had in the absence of cooperative procedures. It is the further purpose of this agreement to provide such cooperative procedures."

Appellant, here, has sought to invoke the provisions of Article IV of the Act. That Article sets forth a mechanism whereby a prosecutor "in a jurisdiction in

which an untried indictment, information or complaint is pending" (Article IV(a)) may secure for trial on that outstanding charge a prisoner then serving a sentence in another jurisdiction. Of particular relevance here is Article IV(e) which further provides that:

"If trial is not had on any indictment, information, or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to article V(e) hereof, such indictment, information, or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice."

It is evident from the language of the Act as well as its legislative history that the statute has no application to prisoners who are merely potential targets of criminal investigations in other jurisdictions, but are not the subjects of pending criminal proceedings. Rather, these sources make clear that the Act's machinery and sanctions apply only to prisoners against whom *outstanding criminal charges are pending*—charges based on untried indictments, informations or complaints.

By its terms, each article of the Act expressly limits its application in this manner. Article I, as noted, states explicitly that the Act as a whole is addressed to problems arising from "outstanding charges against a prisoner", and from "detainers based on untried indictments, informations or complaints." Further, Article III provides a mechanism by which the prisoner may demand a speedy trial of the untried charge, but only if there is "pending in [the] other party State [an] untried indictment, information or complaint on the basis of which a detainer has been lodged" against him (Article III(a)). Article V, which regulates the transfer of custody between jurisdictions, specifies throughout that its terms

pertain to the delivery of temporary custody for the purpose of prosecution of charges contained in untried indictments, informations or complaints (Article V(a)(b)(c)(d) and (h)). Similarly, Article IV, containing the provisions at issue here, is limited, by its terms, to a request for custody made by a "jurisdiction in which an untried indictment, information or complaint is pending" (Article IV (a)).

In support of his claim that he is entitled to relief under the Act, appellant argues that Article IV(e), the provision mandating dismissal of any untried charge if the prisoner is returned to his original place of imprisonment prior to trial, should be interpreted to apply to "contemplated" charges as well as pending ones. But the statutory language simply does not permit of such a tortured construction. The phrase "any indictment, information or complaint *contemplated hereby*" (Article IV(e), emphasis added) plainly refers to the definition of those charges as set forth in Article IV(a)—that is, a "pending", "untried indictment, information or complaint" on the basis of which a detainer has been lodged against the prisoner. Equally plainly, that phrase does not refer to possible criminal proceedings which might arise from a criminal investigation.

Here, it is undisputed that in July of 1974, when appellant was transferred from state custody to the Eastern District of New York, that jurisdiction was not one "in which an untried indictment, information or complaint was pending" against appellant (Article IV (a)). As of that time, no federal charges whatsoever had been lodged against him. Indeed, it was not until a year and a half after his return to state custody that appellant became the subject of any federal criminal charge. Prior to that time, he was, at most, a target of

a criminal investigation who had made admissions regarding his participation in a crime. In these circumstances, the Act is wholly inapplicable.

The Interstate Agreement on Detainers is also inapplicable here because the writ which secured appellant's presence in the Eastern District of New York—a writ of *habeas corpus ad testificandum*—is not the equivalent of a "detainer" within the meaning of the Act.

In the recent case of *United States v. Mauro and Fusco, supra*, this Court had before it the issue of the applicability of the Act to writs of *habeas corpus ad prosequendum*. There, the Court held that a writ of *habeas corpus ad prosequendum* is a "detainer" within the meaning of the Act, "entitling the state inmate to the protection provided in Article IV and specifically to a trial before his return to the state institution" (*id.*, at 592). The Court reasoned that the *ad prosequendum* writ, which commanded the prisoner's presence for trial upon an outstanding indictment, was the substantial equivalent of a detainer, defined as "a notification . . . advising that [the prisoner] is wanted to stand trial on pending criminal charges in another jurisdiction" (*id.*, at 591).

While a *prosequendum* writ secures a prisoner for trial on an outstanding criminal charge, a *testificandum* writ does not. Its purpose is simply to secure a prisoner's presence to testify. Here, the writ commanding that appellant be produced in the Eastern District in July of 1974 advised only that he was wanted "to testify and give evidence before the said Federal Grand Jury in the case of *United States v. John Doe*". It was a "notification . . . advising that he [was] wanted to stand trial on pending criminal charges." ~~*United States v. Mauro;*~~ *United States v. Mauro and Fusco, supra*, at 591. Nor, as we have noted, was any criminal charge pending against him in that district.

Moreover, as the district court reasoned (*Adams v. United States*, Memorandum and Order dated December 17, 1976, at p. 4):

"[Were] the writ of *habeas corpus ad testificandum* subject to the restrictions imposed by the Act, it would place an unreasonable and unintended burden on the government's and the grand jury's investigative function. A prisoner summoned pursuant to the Writ could then require that any subsequent prosecution occur within 180 days of his demand (Article III(a)). The government would also be forced to keep him in federal custody until the trial in order to avoid the sanctions imposed by Article IV."

Since the writ which secured appellant's presence in the Eastern District of New York was not a "detainer" within the meaning of the Act, and since no criminal charges were pending against him in that jurisdiction at the time of the issuance and satisfaction of the writ, the Act simply does not apply to his case.*

* Because of our position that the Act does not apply to this situation, we do not press upon this Court the argument that *United States v. Mauro*, *supra*, should be held applicable only where the state prisoner was returned, without having been tried in federal court, after October 26, 1976, the date of the *Mauro* case. See, Petition for Rehearing or Rehearing *en banc* filed in *United States v. Ferro*, *supra*, pp. 8-24. Nor, do we press upon this court the further arguments that by the failure to raise the Article IV(e) claim prior to the guilty plea, it is deemed waived or that, in any event, a claimed violation of the Act is not cognizable under Title 28, United States Code, § 2255. However, should this Court determine that our reading of the Act is incorrect, we would request an opportunity to argue these points.

CONCLUSION

The order of the ditrict court should be affirmed.

Dated: April 25, 1977

Respectfully submitted,

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

BERNARD J. FRIED,
ALLYNE R. ROSS,
Assistant United States Attorneys,
Of Counsel.

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

DOLORES M. BYRD

being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 25th day of April 1977 he served a copy of the within

BRIEF FOR APPELLEE

by placing the same in a properly postpaid franked envelope addressed to:

Robert Adams (Pro Se), Pembroke Station, Danbury,

Connecticut 06810

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, 225 Cadman Plaza East, Borough of Brooklyn, County of Kings, City of New York.

Dolores M. Byrd

Sworn to before me this

25th day of April 1977

Carolyn N. Johnson

CAROLYN N. JOHNSON
NOTARY PUBLIC, State of New York
No. 41-4615798
Qualified in Queens County
Term Expires March 30, 1978